

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1271

To be argued by
ALLEN HARRIS

In The
United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA,

Appellee.

vs.

ISMAEL ANTONIO RAMOS,

Defendant-Appellant.

*On Appeal from the United States District Court for the Eastern
District of New York.*

BRIEF FOR APPELLANT

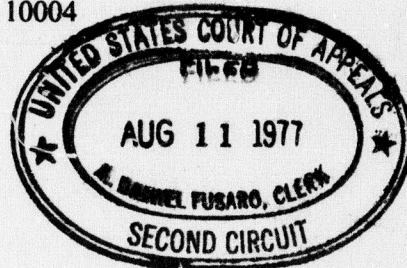
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THE ISSUE AND QUESTION INVOLVED

Did the sentence imposed upon appellant violate the appellant's rights under the United States Constitution because it: (1) compelled him to be a witness against himself; (2) constituted cruel and unusual punishment; and (3) violated due process of law?

UNITED STATES COURT OF APPEALS
For the Second Circuit

- - - - -x

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

ISMAEL ANTONIO RAMOS,

Defendant-Appellant.

- - - - -x

BRIEF FOR APPELLANT

PRELIMINARY STATEMENT

The appellant, Ismael Antonio Ramos (hereinafter referred to as Ramos), appeals from a judgment of sentence of the United States District Court, Eastern District of New York, Judge Thomas C. Platt (hereinafter referred to as Judge Platt).

A complaint was filed against Ramos on January 21, 1977 charging that he did possess with the intent to distribute 17 ounces of heroin hydrochloride in violation of Title 21, United States Code, Section 841(a)(1). The aforesaid Ramos was arraigned before a United States Magistrate who held him in \$75,000 bail which he did not raise and assigned an attorney from the Federal

Defender Services Unit of Legal Aid to represent him. Thereafter, said attorney waived the preliminary hearing before the Magistrate.

On March 18, 1977 Ramos before Judge Platt pleaded guilty to an information, having previously waived indictment. The aforesaid information that Ramos pleaded guilty to charged that he did possess with the intent to distribute approximately 17 ounces of heroin hydrochloride in violation of Title 21, United States Code, Section 841(a)(1).

Subsequently, on May 19, 1977 Judge Platt sentenced Ramos to imprisonment for a period of ten years plus a special parole term of ten years pursuant to Title 18, United States Code, Section 4205(b)(2). It is the legality of this sentence that is being appealed to this Court.

From the facts set forth supra that were summarized from the accompanying appendix, Ramos was last a free man in January, 1977. Ramos is serving his sentence and not on bail pending this appeal.

This appeal is being prosecuted by private counsel retained by Ramos's family. A stipulation of counsel substitution is part of the appendix.

POINT I

THE SENTENCE IMPOSED UPON APPELLANT WAS UNCONSTITUTIONAL AND UNLAWFUL UNDER THE PROVISIONS OF THE UNITED STATES CONSTITUTION BECAUSE IT: (1) COMPELLED APPELLANT TO BE A WITNESS AGAINST HIMSELF; (2) CONSTITUTED CRUEL AND UNUSUAL PUNISHMENT; AND (3) VIOLATED DUE PROCESS OF LAW.

In United States v. Robin, 545 F.2d 775 (2nd Cir. 1976)

Judge Moore wrote in the majority opinion:

"...Criminal sentences are not generally reviewable in this Circuit. However, this Court does have the authority to review sentences under certain limited circumstances..."

The facts in the instant case, as they were in the Robin case cited, supra, are such as to call for this Court's review and corrective action.

Of course a sentencing judge in this Circuit who imposes a sentence within statutory limits has broad discretion. United States v. Sweig, 454 F.2d 181, 183 (2nd Cir. 1972). However, this sentencing discretion to be protected from review even when exercised within statutory limits must not be exercised "...upon improper considerations...", United States v. Seljo, 537 F.2d 694, 699 (2nd Cir. 1976), cert. denied U.S., 50 L.Ed. 756 (March, 1977). Judge Platt in the Ramos case could have legally imposed a maximum jail term of fifteen years. 21 U.S.C.A. Section 841(a)(1). However, the fact that

Judge Platt imposed a lesser term of ten years does not frustrate a review of his sentence because it was within statutory limits, since he imposed it upon an "improper consideration" which fatally poisoned the sentence adjudged so that it became invalid.

The "improper consideration" relied upon by Judge Platt was that Ramos was not going to cooperate with the Government and testify in an upcoming trial and also reveal a'l that he knew, if anything, about illegal narcotic transactions to Government prosecutors (See, appendix, Sentencing Minutes of May 19, 1977, pages 27A-38A).¹ Judge Platt used this "improper consideration" to the exclusion of anything else. In other words, the sentencing Judge rejected from his determination such things as: (1) the Pre-Sentence Report prepared by the Probation Department that gave a profile of Ramos for the purpose of tailoring a sentence that would fit the rehabilitation needs of Ramos as well as the needs of the public; (2) the critical fact that Ramos had a reason for his non-cooperation and that was fear; and (3) the fact that Ramos had a constitutional right not to be compelled to be a witness against himself.

A sixteen page Pre-Sentence Report was prepared by a pro-

1. Page references in the appendix. Hereinafter pages referred to in this brief that appear in the appendix will be denoted by the appendix page).

bation officer concerning Ramos. In substance the Pre-Sentence Report said Ramos, a twenty-three year old, acknowledged his guilt to the charge set forth in the information and said he committed the act to help raise money for his family -- his father is dead, his mother has chronic tuberculosis, he is the oldest of four children, the other children are three sisters ranging in age from twelve years old to nineteen years old -- he lives at home with his mother and sisters, he was born in Puerto Rico, he dropped out of school before graduating high school, he registered for the draft, he does not use drugs, he responded well to the probation officer's questions and maintained a polite and respectful attitude; and that his only previous contact with the law was a 1976 New York City conviction for operating a vehicle with a suspended license for which he received a conditional discharge.² There is no allegation anywhere either in the Pre-Sentence Report or from the Government prosecutors or from any other source that Ramos was a major narcotic figure or dealer. Judge Platt does not contend Ramos was a major narcotic figure anywhere in the sentencing minutes

2. The defendant-appellant respectfully requests that this Court make as part of the record on this appeal a copy of the Pre-Sentence Report. This Court has made Pre-Sentence Reports part of the appellate record before, for example see, United States v. Robin cited supra above at page 778 of that case.

(27A-38A). In the sentencing minutes (37A), Judge Platt said:

"Well, the Court has read the Probation Report... While it is true as you [referring to trial counsel] pointed out that the defendant waived indictment and pled guilty to an information, which certainly is helpful to him, the balance of your statements with respect to his co-operation are not very helpful to the Court..."

Thus, the fair conclusion to be drawn is that Judge Platt arrived at his sentencing decision solely on Ramos's failure to cooperate and rejected out of hand everything else in the Pre-Sentence Report.

In the case of United States v. Sweig cited supra, at page 184

Judge Hays wrote:

"Judge Frankel [who sentenced Sweig] made it perfectly clear, particularly in denying the instant motion, that his intention was merely to leave the door open for a reduction of sentence if Sweig should subsequently be able to show mitigating circumstances. The judge stated expressly the 'universally known possibility' that cooperation with law enforcement officials should be entitled to consideration."

Unlike Judge Frankel who did not condition his sentence on cooperation but merely left the "door open", Judge Platt conditioned Ramos's sentence solely on Ramos's lack of cooperation. In other words, he was telling Ramos "walk only if you talk" regardless of how good a Pre-Sentence Report Ramos had. This approach is frighteningly reminiscent of totalitarian regimes that coerce

cooperation from prisoners by starvation, torture and other forms of brutalization. The sentencing judge's "improper consideration" flies in the face of civilized sentencing standards. For example, the Standards Relating To Sentencing Alternatives and Procedures, ABA, Approved Draft (1969) state on page 141:

"2.2 General principle: judicial discretion.
The sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant."

Nothing is said in the aforesaid standard that the state of the defendant's cooperation is the determining factor in the decision as to the length of defendant's confinement.

It should be noted that Ramos does not contest the fact that he committed a criminal act and expects to be punished. But, the punishment he has a right to expect to be imposed is one that is constitutionally permitted so that he can be rehabilitated and take his place in society.

This case does not involve a "reneged deal". The Government never made a deal with Ramos. For example, Ramos was held in \$75,000 bail (1A) and when a motion was made by trial counsel to reduce it, the Government prosecutor opposed it and Judge Platt continued the bail at \$75,000 (25A-26A).

Ramos, through this trial counsel, gave fear as a reason

for not testifying at the aforementioned forthcoming trial and for no further cooperation. At page 31A of the appendix, trial counsel argued to Judge Platt:

"As far as testifying, he [Ramos] has expressed to me a tremendous fear against his family and it's a fear that he cannot personally just step forward and overcome..."

Further on at pages 33A-34A of the appendix,³ trial counsel had the following discussion with Judge Platt:

"MR. TERMINI (Trial Counsel): At this stage, my client tells me he would not testify, which of course, because of the possible consequences to his family.

THE COURT: Did he think of the possible consequences to himself?

MR. TERMINI: Reluctantly he has, your Honor. I just discussed this with Mr. Ramos and I advised him that possibly a more heavier sentence could possibly result. And, what I'm trying to say, your Honor is that at no time was the Government ever taking any real consideration for this man at any time during this case...

THE COURT: As far as I know from what Ms. Fields (Assistant United States Attorney) says, he hasn't been willing to cooperate."

3. The references to the appendix pages dealing with the "fear" discussion come from the sentencing minutes.

Nowhere in the sentencing minutes, which contain twelve pages (27A-38A), did Judge Platt either ask Ramos what he fears nor did he ask Prosecutor Fields what protection would the Government provide Ramos and to his family, if Ramos cooperated. Rather, Judge Platt in cold blood rejected the "fear" factor out of hand.

Finally, Judge Platt, in order to carry out his self-assumed role mission to get Ramos to cooperate at any cost or else have him pay heavily in a long prison and parole sentence, set about doing everything within his power to strip Ramos of his constitutional right not to "...be compelled in any criminal case to be a witness against himself..."⁴. Judge Platt, himself, in a recent case, acknowledged that a sentencing judge cannot go beyond permissible limits of discretion, when he wrote in Collins v. United States, 418 F.Supp. 577 (1976) at page 580:

"...appellate review of sentences is common where the sentencing court failed to follow proper procedure in imposing sentence."

Judge Platt served from 1953-1956 as an Assistant United States Attorney for the Eastern District of New York.⁵

A review of Judge Platt's conduct as evidenced by his words appearing throughout the previously cited sentencing minutes can

4. U.S.C.A. Const. Amend. 5

5. Federal Bar Council, Second Circuit Redbook 281 (1977).

leave little doubt that he departed from the impartial role of Judge and returned to his former role of a slashing partisan advocate -- that of prosecutor -- bent on obtaining information from a potential witness who was a defendant. Of course in the Ramos case, the insidious part was that Ramos was contending with a prosecutor armed with the sentencing power of a Judge. The following example from the aforesaid minutes is offered (31A-33A):

"THE COURT: There's a co-defendant involved here who is going to go to trial.

TRIAL COUNSEL
(MR. TERMINI): Yes, your Honor, exactly.

THE COURT: Now, surely, his testimony would be helpful in that.

MR. TERMINI: ...I don't know how the Government proceeds in the Grand Jury, I'm assuming they have a fairly decent case to have proceeded in the Grand Jury without asking Mr. Ramos to testify in the Grand Jury...

THE COURT: Forget about the Grand Jury, Mr. Termini, that's water over the dam. I mean, if he is anxious to show his cooperation with the Government, his time is now to say to the Government, 'I'm willing to assist you in the trial.'

MR. TERMINI: What I'm stating, your Honor, is that at no time did the Government ask --

THE COURT: You mean to say the Government doesn't want his testimony at trial?

MR. TERMINI: No, I assume they would probably like it.

THE COURT: Wait a second; Ms. Fields, is that so, you don't want his testimony?

MS. FIELD: No, your Honor. In fact, we have spoken to Mr. Termini and had him speak with his client concerning testifying at trial, and he indicated he would not.

THE COURT: That argument you just presented carries little or no weight with this Court. In fact, no weight in light of what Ms. Fields just said.

* * *

THE COURT: She just said she wanted his testimony."

Without even so much as a law student's regard to the sanctity of Ramos's fifth amendment privilege, Judge Platt bluntly and openly attempted a final assault on Ramos's aforesaid privilege by the following exchange that appears in the aforesaid minutes (34A-35A):

"THE COURT: As far as I know from what Ms. Fields says, he hasn't been willing to cooperate.

MR. TERMINI: This man gave a full statement at the time of his arrest and he was in Mr. DePetris's [Assistant United States Attorney] office with me for numerous hours.

THE COURT: Maybe before we sentence you, you ought to take him up to Ms. Fields's office and see whether she thinks

he is going to cooperate, and whether she is willing to make such a report to this Court, but don't come in here and tell me the man is cooperating when Ms. Fields says he is not.

MR. TERMINI: I'm not trying to say there is full cooperation in this case, I'm trying to give some background because it is raised in the Probation report, and I, obviously, foresee consequences based on that.

THE COURT: Take him up to Ms. Fields's office and have a heart to heart with him, with her about the problem."
(Emphasis ours.)

The use of a sentencing carrot by a Judge to entice the surrender of the fifth amendment privilege in order to get a lighter sentence, has been condemned by the Third Circuit in the recent case of United States v. Garcia, 544 F.2d 681 (1976). The sentencing Judge in the Garcia case was a former United States Attorney for New Jersey, Herbert Stern.⁶ The Garcia case was a unanimous decision. Circuit Judge Aldisert held for the Court as follows:

"[At page 682 of the opinion] On collision course, in these appeals run two venerated principles of jurisprudence. The first is that unique jewel in the showcase of American liberty, the Fifth Amendment, commanding that one may not be compelled to testify against oneself; the second is the principle that a

6. I respectfully submit that this Court can take judicial notice that Judge Stern was a former United States Attorney.

court may properly invoke its power to grant lenity to those who, having admitted transgressions against the sovereign, thereafter assist the sovereign in improving social order and the public welfare.

It is not open to serious question that the sentencing court strove to vindicate the second principle [note, there were guilty pleas in the Garcia case as there was here].

* * *

[At page 683 of the opinion] We are left to determine whether the principle against compelled self-incrimination was contravened by the weight accorded defendants' failure to cooperate with government authorities.

* * *

[At pages 684-685] Appellants' self-incrimination argument is straightforward: they argue that the sentencing court unwittingly placed them in a 'damned-if-you-do-and-damned-if-you-don't' position. To obtain lenity and thus avoid 'a substantial term of incarceration', Antonmarchi was required to be of 'assistance to law enforcement authorities in cleaning up [the drug] problem'. Garcia was required to reveal the source of his supply of cocaine and to assist 'the proper authorities in stamping this problem out.'

In order to obtain lenity on a sentence for a guilty plea in which each had admitted guilt to a narrow compass of facts, then, appellants were in effect coerced to furnish the prosecutor with factual information of a broader and potentially unlimited factual scope. And they were required to disgorge this information without any assurance of immunity from future federal or state prosecutions resulting from the information supplied by them. [Emphasis ours.]

* * *

Accordingly, if either appellant had acceded to the sentencing court's request to reveal his source of supply of cocaine, there was no guarantee that he would not be subsequently indicted for other acts not encompassed in the plea agreement.

The appellants were put to a Hobson's choice; remain silent and lose the opportunity to be the objects of leniency, or speak and run the risk of additional prosecution. A price tag was thus placed on appellants' expectation of maximum consideration at the bar of justice; they had to waive the protection afforded them by the Fifth Amendment. This price was too high. We, therefore, cannot permit the sentences to stand.

We recognize, and indeed emphasize, that leniency, compassion, and special consideration cannot be expected from a sentencing court upon the entry of every guilty plea. The process is not automatic. Sentencing courts are afforded wide discretion in determining whether these factors should be invoked or withheld in marking the dimensions of a sentence. One who affirmatively seeks special favor at sentencing has the burden of proving why it should be bestowed. Nothing that we say today, however, should deter the bestowal by the court of special favor upon those petitioners at the bar who have rendered special assistance to peace officers in efforts to reduce criminal activity and to punish other criminals. We do say, with the Bard, that mercy seasons justice, but the quality of mercy is strained when its price is abandonment of the classic freedom against self-incrimination."

It is now time for the Second Circuit to adopt the Third Circuit approach in Garcia and apply that approach to the Ramos case. No longer should a defendant be sentenced to a long prison term simply because he will not give up his right of self-incrimination and thus be turned into a hostage for information not a candidate for rehabilitation, based upon a totality of factors set forth in his Pre-Sentence Report.

The almost seven year-old case in this Circuit of United States v. Vermulen, 436 F.2d 72 (2nd Cir. 1976), cert. denied 402 U.S. 911 (1971), has no application to the Ramos case because the sentencing judge in Vermulen did not condition the severity of the sentence solely on defendant's cooperation. The sentencing judge was Judge Travia. Unlike Judge Platt who used cooperation as the only factor, Judge Travia used cooperation as one of many factors in arriving at the sentence. Judge Moore of this Court wrote in Vermulen at page 76:

"We are persuaded that the sentencing Court did not impose a 'price tag' on appellant's constitutional privilege to remain silent."

Certainly Judge Platt placed a "price tag" on Ramos's constitutional privilege to remain silent.

The sentence Judge Platt imposed on Ramos also violated his constitutional right under the Eighth Amendment to the

United States Constitution that deals with "...nor cruel and unusual punishments inflicted" because it was "grossly unjust." Davis v. Davis, 21 Cr. L. 2175 (United States District Court W.Dist. Virginia, May 5, 1977⁷).

Lastly, Judge Platt's sentence violated Ramos's constitutional right under the Fifth Amendment to the United States Constitution that guarantees "No person...shall...be deprived of...liberty...without due process of law..." because the arbitrariness of Ramos's sentence condemned him to suffer grievous loss. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

As in the Robin case at page 782 cited, supra, this Court should vacate the sentence, remand for resentencing and following "...the preferred practice in such cases, resentencing...(should) be before a different judge." A different judge will preserve the appearance of justice and especially, in view of Judge Platt's actions as detailed, supra., it would be reasonable to expect that he would have substantial difficulty in putting out of his mind previously-expressed views.

7. In the Davis case the District Court set aside a couple of consecutive twenty-year sentences and fines totaling \$20,000 imposed upon a habeas corpus petitioner convicted in Virginia of possessing marijuana with intent to distribute and the distribution of marijuana.

CONCLUSION

The sentence should be vacated and remanded for resentencing before a different judge.

Respectfully submitted,

Perrotta and Harris
Attorneys for Defendant-
Appellant



**COURT OF APPEALS
SECOND CIRCUIT**

UNITED STATES OF AMERICA,
Appellee,

- against -

ISMAEL ANTONIO RAMOS,
Defendant-Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

SS.:

I, James A. Steele being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 112 West 136th Street; New York, New York

That on the 11 ~~th~~ day of August 19 77 at 225 Cadman Plaza
Brooklyn, New York upon
deponent served the annexed

Appendix

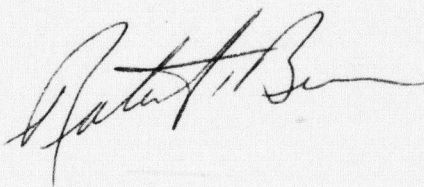
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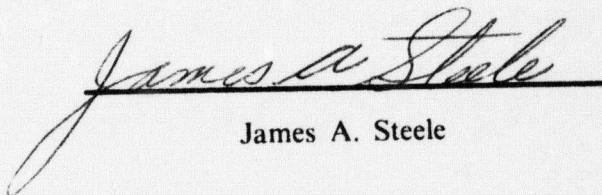
Trager, ~~DAVID~~ David

U.S. Atty. Eastern District

the in this action by delivering a true copy thereof personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein,

Sworn to before me, this 11 ~~th~~ day of August, 19 77




James A. Steele